

TABLE OF CONTENTS

	PAGE
INTEREST OF THE <i>Amicus</i>	1
PRELIMINARY STATEMENT	2
QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED	3
SUMMARY OF ARGUMENT	3
ARGUMENT	
POINT ONE—Limiting exemption from military service on the basis of conscientious exemption to those whose objection is based on religion constitutes preferential treatment of believers over nonbelievers in violation of the No-Establishment Clause of the First Amendment	6
A. The Constitutional Requirement of Neutrality Between Religion and Nonreligion	6
B. The Limitation of the Exemption to Conscientious Objection on Religious Grounds	10
C. The Arbitrary Nature of the Distinction Between Religious and Nonreligious Objection	13
1. The test of reasonableness in First Amendment cases	13
2. The lack of justification for the statutory distinction	17
D. The Involvement of Draft Boards in Theological Determinations	20

POINT Two—Limiting exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treatment of adherents of some religious or ethical systems over others in violation of the No-Establishment Clause of the First Amendment	22
A. Equality Among Sects	22
B. The Ethical Nature of Selective Objection	26
CONCLUSION	31

TABLE OF AUTHORITIES

Cases:

Abrams v. United States, 250 U. S. 616 (1919)	16
Braunfeld v. Brown, 366 U. S. 599 (1961)	11
Church of Jesus Christ of Latter Day Saints v. United States, 136 U. S. 1 (1890)	20
Engel v. Vitale, 370 U. S. 421 (1962)	8, 10
Epperson v. Arkansas, 393 U. S. 97 (1968)	7
Everson, People ex rel. v. Board of Education, 330 U. S. 1 (1947)	6, 9, 10
Ex parte Endo, 323 U. S. 283 (1944)	17
Gallagher v. Crown Kosher Market, 366 U. S. 617 (1961)	15
Hamilton v. Regents of the University of California, 293 U. S. 245 (1934)	8, 16, 17, 25
Harmon v. Brucker, 355 U. S. 579 (1958)	17
Hirabayashi v. United States, 320 U. S. 81 (1943)	16
Jenison, In re, 265 Minn. 96, reversed, 375 U. S. 14 (1963), 267 Minn. 136 (1964)	10

	PAGE
Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 (1952)	21
Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963)	17
Korematsu v. United States, 323 U. S. 214 (1944)	16
Kreshik v. St. Nicholas Cathedral, 363 U. S. 190 (1960)	21
McCollum, People ex rel. v. Board of Education, 330 U. S. 1 (1947)	7, 10
McGowan v. Maryland, 366 U. S. 420 (1961)	7
Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. S. 440 (1969)	21, 25
Rochin v. California, 342 U. S. 165 (1952)	13
School District of Abington Township, Pa. v. Schempp, 374 U. S. 203 (1963)	7, 10, 18, 22
Selective Draft Law Cases, 245 U. S. 366 (1918)	11
Shapiro v. Thompson, 394 U. S. 618 (1969)	14, 23
Sherbert v. Verner, 374 U. S. 398 (1963)	10, 14, 15
Sicurella v. United States, 348 U. S. 385 (1955)	23
Speiser v. Randall, 357 U. S. 513 (1958)	8
Summers, In re, 325 U. S. 561 (1945)	8, 16, 17
Thomas v. Collins, 323 U. S. 516 (1945)	14
Thornhill v. Alabama, 310 U. S. 88 (1940)	14
Torcaso v. Watkins, 367 U. S. 488 (1961)	7, 9, 10, 15, 23
United States v. Ballard, 322 U. S. 78 (1944)	21
United States v. Bowen, U.S.D.C., N.D., Cr. No. 42499, decided December 24, 1969	28
United States v. Guest, 383 U. S. 745 (1966)	14
United States v. Macintosh, 283 U. S. 605 (1931) ...	8, 16, 17
United States v. Seeger, 380 U. S. 163 (1965)	9, 18, 19, 20, 21, 23, 28

United States v. Townsend, 151 F. Supp. 378 (D.C., Dist. Col., 1957)	13
Watson v. Jones, 80 U. S. 679 (1871)	21
West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943)	14, 17
Zorach v. Clauson, 343 U. S. 306 (1952)	7
 <i>Other Authorities:</i>	
Chafee, Free Speech in the United States	16
Cornell, <i>The Conscientious Objector and the Law</i> (1943)	13
Cronbach, Abraham, in <i>Yearbook of the Central Conference of American Rabbis</i> , Vol. XLVI, pp. 198ff.	30
Gendler, Everett E., "War and the Jewish Tradition," in "A Conflict of Loyalties; the Case for the Selective Conscientious Objector," James Finn, ed. (1968)	30
Holy Bible	29
Leviticus Rabbah, Tzav IX, 9	29
Mansfield, Conscientious Objection—1964 Term, 1965 Religion and the Public Order 3	11
Mishnah Sanhedrin	29
Pesikta Rabbati, 21:18	29
Sanhedrin, 74a	29
Selective Service System Monograph No. 11, Conscientious Objection, vol. 1, at 54 (1950)	12
Sibley and Jacob, Conscription of Conscience (1952)	13
Stone, The Conscientious Objector, 21 COLUMBIA UNIVERSITY Q. 253 (1919)	11
Synagogue Council of America, "Judaism and World Peace: Focus Viet Nam" (1966)	27, 29, 30

PAGE

Synagogue Council of America, Commission on Social Justice, Resolution on "Conscientious Objection"	30
U. S. War Office, Statement Concerning the Treat- ment of Conscientious Objectors in the Army (1919)	12

Statutes:

Act of May 18, 1919, ch. 15, Sec. 4, 40 Stat. 78	19
National Services Act of 1948, 11 & 12 Geo. 6, c. 64, §17	12



IN THE
Supreme Court of the United States
October Term, 1969

No. 305

UNITED STATES OF AMERICA,

Appellant,

v.

JOHN HEFFRON SISSON, JR.,

Appellee.

On Appeal from the United States District Court,
District of Massachusetts

**BRIEF OF AMERICAN JEWISH CONGRESS,
AMICUS CURIAE**

Interest of the Amicus

The American Jewish Congress is a national organization of American Jews, founded more than 50 years ago to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to preservation of the great freedoms secured by the First Amendment. Since the case before the Court raises issues concerning the First Amend-



IN THE
Supreme Court of the United States
October Term, 1969

✓ No. 305

UNITED STATES OF AMERICA,

Appellant,

v.

JOHN HEFFRON SISSON, JR.,

Appellee.

On Appeal from the United States District Court,
District of Massachusetts

**BRIEF OF AMERICAN JEWISH CONGRESS,
AMICUS CURIAE**

Interest of the Amicus

The American Jewish Congress is a national organization of American Jews, founded more than 50 years ago to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to preservation of the great freedoms secured by the First Amendment. Since the case before the Court raises issues concerning the First Amend-

ment's guaranty of religious liberty and the separation of church and state as well as issues arising under the Fifth Amendment, we have sought and obtained the consent of the parties to the submission of this brief *amicus curiae*.

Preliminary Statement

This Court is asked in this case to consider the constitutionality of Section 6(j) of the Military Selective Service Act of 1967 insofar as it limits the exemption from combat training and service granted to conscientious objectors to one who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. 456(j). Expressly excluded from the term "religious training and belief" are "essentially political, sociological, or philosophical views, or a merely personal moral code" (*ibid*).

The appellee, John Heffron Sisson, Jr., refused to accept induction into the armed forces of the United States because he was "conscientiously opposed to service" in the Vietnam war on nonreligious grounds. A jury in the United States District Court for the District of Massachusetts found him guilty of having unlawfully refused to comply with his draft board's order to submit to induction. Chief Judge Wyzanski, however, granted Sisson's motion in arrest of judgment, holding (1) that, "in granting to the religious conscientious objector but not to Sisson a special conscientious objector status, the Act, as applied to Sisson, violates the provision of the First Amendment that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof,' " and

(2) that the statute unconstitutionally discriminates against a person conscientiously opposed to American participation in the Vietnam war as immoral and unjust who does not also object to service in all wars.

The case is here on the Government's direct appeal from the District Court.

Questions to Which This Brief Is Addressed

This brief is addressed to two questions: (1) Whether Congress may constitutionally limit the draft exemption of conscientious objectors to those whose opposition is based on religious grounds; and (2) whether Congress may constitutionally limit the draft exemption of conscientious objectors to those who are opposed to participation in war in any form.

Summary of Argument

I. Limiting exemption from military service on the basis of conscientious exemption to those whose objection is based on religion constitutes preferential treatment of believers over nonbelievers in violation of the No-Establishment Clause of the First Amendment.

A. The No-Establishment Clause requires the government to maintain neutrality not only among religions but also as between believers and nonbelievers. The Clause prevents the government from throwing its support to one side of an issue that must be resolved by each man in his own conscience. In arguing below that Section 6(j) unconstitutionally excludes nonreligious, ethical conscientious

objectors from exemption, we refer to discrimination against those whose objection is based on what may be regarded as a "faith" on a par with religious creeds, rather than what Section 6(j) refers to as "political *** views."

B. The existence of conscientious objection on non-religious grounds is well recognized. Hence, the question arises whether the government may make a distinction, in granting exemption from military service, between conscientious objection which rests on a religious base and that which rests on a nonreligious, ethical base.

C. A distinction between believers and nonbelievers cannot be made by government except to promote a compelling governmental interest. In this case, such an interest is lacking. If the grant of exemption is designed to support freedom of religion, its discrimination against nonbelievers is clearly unconstitutional. Neither can it be argued that the distinction is justified by considerations of convenience because of the identifiable nature of religious objection.

D. The distinction between religious and nonreligious objection runs afoul of the First Amendment because it requires draft boards and the reviewing courts to make theological determinations.

II. Limiting exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treatment of adherents of some religious or ethical systems over others in

violation of the No-Establishment Clause of the First Amendment.

A. The Constitution prohibits government from making distinctions among religious sects. Such a distinction is made by Section 6(j). This does not mean that the Constitution requires military exemption for any form of conscientious objection but only that it bars distinctions among different bodies of religious or ethical belief.

B. Conscientious objection to a particular war or type of war is properly regarded as based on a body of belief analogous to religious conscientious objection to all wars. This is true even if the objection is based in part on a political judgment. The Government has failed to show compelling reasons to justify discrimination between the two forms of objection.

There is a basis in Jewish tradition for selective conscientious objection. However, the ultimate test is whether the individual registrant sincerely believes that nonparticipation in a war or type of war is required by his religious or ethical belief.

ARGUMENT

POINT ONE

Limiting exemption from military service on the basis of conscientious exemption to those whose objection is based on religion constitutes preferential treatment of believers over nonbelievers in violation of the No-Establishment Clause of the First Amendment.

A. The Constitutional Requirement of Neutrality Between Religion and Non-Religion

The No-Establishment Clause has consistently been interpreted to require government to maintain neutrality, not only among religions, but also "in its relations with groups of religious believers and non-believers." *People ex rel. Everson v. Board of Education*, 330 U.S. 1, 18 (1947). This position was expressed more fully in the following statement from *Everson* (at 15-16):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance* ***. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." (Emphasis added.)

The Court went on to say (at 16) :

- [The State] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. (Emphasis in original.)

The *Everson* interpretation has been repeatedly reaffirmed by this Court: *People ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-211 (1948); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 492-493 (1961); *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 216 (1963). As stated in *Schempp*, "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another" (374 U.S. at 216). See also Brennan, J. concurring, *id.* at 299: "The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion." Again, in *Torcaso, supra*, this Court said that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers" (367 U.S. at 495). Most recently, this Court said in *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968) :

- The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.¹
- The requirement of government neutrality is a corollary more of the no-establishment than of the religious freedom

1. See also Justice Black, dissenting in *Zorach v. Clauson*, 343 U.S. 306, 320 (1952) :

The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.

aspect of the First Amendment. Its thrust is to prevent the government from throwing its support to one side of an issue that must be resolved by each man in his own conscience. It is for that reason that, as to that aspect of the First Amendment, it is not necessary to show that the offending act forces a person to profess a religious belief. Thus, in *Engel v. Vitale*, 370 U.S. 421 (1962), this Court held that a prayer program instituted in a public school system in New York was unconstitutional, even though students were not required to participate in it. The Court said (at 430) :

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

It may be assumed for the purpose of this brief that the conscientious objection exemption is a privilege granted by Congress rather than a right guaranteed by the Constitution. See *United States v. Macintosh*, 283 U. S. 605 (1931); *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934); *In re Summers*, 325 U. S. 561 (1945). However, while a government may grant or withhold a privilege, it cannot condition its availability on unconstitutional grounds. In *Speiser v. Randall*, 357 U. S. 513 (1958), California had required an applicant for a certain tax exemption to affirm that he did not advocate the overthrow of the Government. This Court said (at 518) :

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them

for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

Similarly, in *Torcaso*, the argument that a religious test oath for notaries public was valid since "a person is not compelled to hold public office" was specifically rejected. 367 U. S. at 495-496.

It is noteworthy that, in *Everson*, this Court referred to " * * * Non-believers, * * * or the members of any other faith * * *, " thus treating the philosophical system of nonbelief as a faith. Even though the sentence goes on to refer to "faith, or lack of it," we believe the first formulation has validity here. In arguing below that Section 6(j) unconstitutionally excludes nonreligious, ethical conscientious objectors from exemption, we refer to discrimination against those whose objection is based on what may be regarded as a "faith" on a par with religious creeds, rather than what Section 6(j) refers to as "political * * * views."² We urge a formula similar to, but going beyond, that laid down in *United States v. Seeger*, 380 U. S. 163 (1965). There, this Court interpreted Section 6(j) as it then read³ so that (at 166-167):

* * * the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and mean-

2. Section 6(j) provides in part: "As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

3. At the time of the *Seeger* decision, Section 6(j) contained the following sentence: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, * * *"

ingful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.

We urge below that a nonreligious, ethical conscientious objector, viewed by a similar standard, cannot be excluded from an exemption available to others on a religious basis.⁴

B. The Limitation of the Exemption to Conscientious Objection on Religious Grounds

The *Everson* interpretation has been applied to protect the rights of atheists who refuse to participate in religious instruction in public schools (*McCollum*), or in school prayer or Bible reading programs (*Engel; Schempp*), or who apply for public office (*Torcaso*). Surely those who conscientiously refuse to take human life deserve the same protection. Such an application of that protection would seem a logical step. As stated by Justice Frankfurter in his separate opinion in *McCollum* (333 U. S. at 212-213):

The case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the

4. Acceptance of the argument made here would not mean that such rulings of this Court as those in *Sherbert v. Verner*, 374 U.S. 398 (1933) (barring penalization by the state of those who for religious reasons observe a Sabbath other than Sunday) or *In re Jenison*, 265 Minn. 96, reversed, 375 U.S. 14 (1963), 267 Minn. 136 (1964) (same as to service on a jury), would be extended to all similar situations where the person's motivation was other than religious. Any extension would properly be limited to those who acted on a sincere and meaningful belief on a par with religious belief.

separation of church from state is unfolded as appeal is made to the principle from case to case.⁵

We submit that conscientious objection on ethical, moral but nonreligious grounds cannot be placed constitutionally on a lower plane than religious conscientious objection. Society has recognized that nonreligious objection can be "conscientious."

A "conscientious objector" has been defined as "one who refuses or is exempted from service in the armed forces as contrary to his moral or religious principles." Webster's Third International Dictionary (1961). And Harlan Fiske Stone (later Chief Justice) reminded us long ago that, "While conscience is commonly associated with religious convictions, all experience teaches us that the supreme moral imperative which sometimes actuates men to choose one course of action in preference to another and to adhere to it at all costs may be disassociated from what is commonly recognized as religious experience." Stone, *The Conscientious Objector*, 21 Columbia University Q. 253, 263 (1919).

Congress itself, by restricting Section 6(j)'s application to religious objectors, has impliedly recognized the ex-

5. In the *Selective Draft Law Cases*, 245 U.S. 366 (1918), a contention that the 1917 Draft Act violated the No-Establishment and Free Exercise Clauses of the First Amendment was dismissed with no discussion of the issue (at 389-390). We submit that the decisions of this Court interpreting the First Amendment during the last two decades destroy the validity of that unrationalized holding. Moreover, it is questionable whether the registrants in that case had standing to raise any question under the First Amendment. See, Mansfield, "Conscientious Objection—1964 Term," 1965 *Religion and Public Order* 3,79.

istence of nonreligious objectors. Indeed, the government has in the past recognized their sincerity. Although the Draft Act of 1917 exempted religious objectors only, the Secretary of War in 1917 instructed that "personal scruples against war" be considered as constituting "conscientious objection." An order from the Adjutant General of the Army, dated December 19, 1917 (printed in Selective Service System Monograph No. 11, Conscientious Objection, vol. 1, p. 54 (1950)) stated that:

The Secretary of War directs that until further instructions on the subject are issued "personal scruples against war" should be considered as constituting "conscientious objection" and such persons should be treated in the same manner as other "conscientious objectors" under the instructions contained in confidential letter from this office dated October 10, 1917.

A similar extension of the benefit of exemption from combatant service to nonreligious conscientious objectors was effected by President Wilson's Executive Order of March 20, 1918. That order directed assignment to noncombatant service for draftees who objected to participating in war because of "other conscientious scruples" as well as for those exempt under the Selective Service Act because of religious objections. U. S. War Office, Statement Concerning the Treatment of Conscientious Objectors in the Army (1919) 38-9.

The sincerity of non-religious conscientious objectors has been recognized in Great Britain by legislation which exempted all whose objections were conscientious, regardless of the basis for objection. National Services Act of 1948, 11 & 12 Geo. 6, c. 64, §17. For a discussion of the

British experience, see Sibley and Jacob, *Censorship of Conscience* (1952) 47; Cornell, *The Conscientious Objector and the Law* (1943) 119-121.

What is the basis for the grant of draft exemption for conscientious objection, which has such a long history in this country? It is likely that a primary motive is that it is shocking to the conscience to force a man to kill another in violation of deeply-held principles. To do so might well raise questions under the Due Process Clause as to whether such government compulsion is not inconsistent with the principles of an ordered society.⁶

However, it is not necessary in this case to argue that such compulsion is so repulsive to the conscience of society as to be at all times unconstitutional. The issue here is whether it is unconstitutionally arbitrary, and violative of the No-Establishment Clause, to recognize the compelling nature of this compulsion in the case of religious objection but not in the case of nonreligious, ethical objection. That issue must be resolved in the light of the reasons that may be given for the distinction drawn by the statute.

C. The Arbitrary Nature of the Distinction Between Religious and Nonreligious Objection

1. The test of reasonableness in First Amendment cases

For legislation abridging a liberty secured by the First Amendment a rigorous test is imposed. "The rational

6. *Rochin v. California*, 342 U. S. 165, 172 (1952) is authority for the proposition that the Due Process concept bars government compulsion that "shocks the conscience." In that case, the use of evidence obtained by forcibly "stomach pumping" the accused was held to violate the Due Process Clause of the Fourteenth Amendment. See also *United States v. Townsend*, 151 F. Supp. 378 (D. C. Dist. Col., 1957).

connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U. S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940); *Sherbert v. Verner*, *supra*, 374 U. S. at 406. See also *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639 (1943).

This Court recently had occasion to make clear that this approach applies generally to all fundamental constitutional rights. In *Shapiro v. Thompson*, 394 U. S. 618 (1969), it rejected reasonable considerations of convenience in invalidating state laws limiting welfare benefits to persons who had resided a minimum length of time within the state. After referring to the holding in *United States v. Guest*, 383 U. S. 745 (1966) that the right to travel among the states "occupies a position fundamental to the concept of our Federal Union" (at 630), this Court said (at 634):

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification * * * [A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. (Emphasis in original.)

The *Torcaso* case, *supra*, provides an example of the application of this approach. Absent the First Amendment, it could not be said that the state's apparent determination there that believers in God are likely to be more honest and conscientious civil servants than nonbelievers was arbitrary and unreasonable. Indeed, the state there argued that it could hardly be deemed unreasonable to require that a notary public (the office involved in that case) who is given the power to administer oaths himself believe in God. Brief for Appellee in *Torcaso*. (October Term 1960, No. 373), p. 19. As noted by the Court in *Sherbert v. Verner, supra*, 374 U. S. at 410n, there was in *Torcaso* "an undoubted state interest in ensuring the veracity and trustworthiness of Notaries Public." But the answer, as *Torcaso* makes clear, is that there are certain classifications which the First Amendment forbids government to make, irrespective of their possible factual reasonableness, and one of these is a classification based upon a belief in God.

The Sunday Law cases, and specifically *Gallagher v. Crown Kosher Market*, 366 U. S. 617 (1961), and *Braunfeld v. Brown*, 366 U. S. 599 (1961),⁷ are not inconsistent with this assertion. The Court there held that Sunday laws are today secular laws for the purpose of ensuring a uniform day of rest, and that the states are not constitutionally required to accord exemptions for religious reasons. But nothing in the Court's decision can be interpreted to give any support to an argument that the states could constitutionally exempt adherents of certain non-Christian religions from the operation of the statute while withholding the

7. We suggest that the force of these decisions has been substantially weakened by *Sherbert v. Verner, supra*.

exemption from adherents of other faiths. We are confident that this Court would not uphold a statutory exemption to Sunday laws in favor of only those who observe Saturday as their holy day of rest but denied it to those who, with equal religious sincerity, observe Friday as their holy day of rest. Nor, we suggest, would the unconstitutionality of such a classification be mitigated by a not unreasonable state finding that policing problems would be much more difficult if the exemption were not limited to a single, specific day.

Nor can *Torcaso* be distinguished because in the present case the governmental interest involved is national defense. The interest of national defense might justify a refusal by Congress to grant any exemption from military service on grounds of conscience. *United States v. Macintosh, supra*, 283 U. S. at 623-4; *Hamilton v. Regents of the University of California, supra*, 293 U. S. at 263-5; *In re Summers, supra*, 325 U. S. at 571-3. But, we submit, nothing in those decisions supports the conclusion that, once Congress has elected to grant exemption to those who conscientiously object to military service, it can limit that exemption to those whose objection is based on religious grounds, excluding those who object, just as sincerely, on nonreligious grounds.

There was a time when assertion of the needs of national defense almost foreclosed all further judicial inquiry and freed government from the restraints imposed by the Bill of Rights. Cf. *Abrams v. United States*, 250 U. S. 616 (1919); *Hirabayashi v. United States*, 320 U. S. 81 (1943); *Korematsu v. United States*, 323 U. S. 214 (1944); Chafee, *Free Speech in the United States, passim*. Fortunately, that time has passed and hopefully will not return. Cf.

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943); *Ex parte Endo*, 323 U. S. 283 (1944); *Harmon v. Brucker*, 355 U. S. 579 (1958); *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963).

2. *The lack of justification for the statutory distinction*

The purpose of the exemption is either to prevent, or at least reduce, the possibility that a man will be forced to violate his religious conscience by fighting or, independently of religious considerations, it is to prevent or reduce the possibility of compelling a man to kill in a cause which his ethical system rejects.¹ In the first case, we submit, the purpose—to benefit religion—directly violates the No-Establishment Clause. In the second, the drawing of the line on the basis of religious belief can be justified only by compelling governmental interest.

Any attempt to show that the purpose of the exemption is to give some form of limited, half-hearted support to the constitutional guarantee of freedom of religion faces an obvious obstacle. Fundamental to the government's case—and to the earlier decisions of this Court (see the *Macintosh, Hamilton* and *Summers* cases, *supra*)—is the argument that the Constitution does not require any exemption for religious conscientious objectors. Thus, the statutory exemption is not designed to fulfill a constitutional obligation. It is designed rather to do what is fair, and at the same time feasible, in striking a balance between the defense needs of the government and the needs imposed on the individual by his conscience. But in striking such a balance, the government may not make arbitrary distinctions and

certainly not distinctions between believers and non-believers.

Indeed, if the purpose of the statute is solely to preserve the religious expression which manifests itself in conscientious objection, it runs afoul of the test laid down in the *Schempp* case (374 U. S. at 222) :

* * * what are the purpose and the primary effect of the enactment? If either is the advancement or the inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

This test, we believe, bars any statutory distinction designed to advance religion but not nonreligion. As long as the individual acts out of "a given belief that is sincere and meaningful" and "occupies a place in the life of its possessor parallel to that filled by" religion, to use the language of the *Seeger* case, 380 U. S. at 166, there is no basis for discrimination that can withstand the constitutional command. It is true that *Seeger* used the quoted language in barring a distinction between two forms of religious belief—those which do and do not have "a relation to a Supreme Being." We do not claim that either the *Seeger* holding or the language quoted dispose of the issue here. We do believe, however, that the formulation there used can be aptly applied to the relationship between the two sets of belief involved here—religious and nonreligious objection to armed service—and that the cases cited above barring gov-

ernmental discrimination between religion and nonreligion apply to that relationship.

If, however, the purpose of the exemption is to avoid violation of ethical systems generally—to avoid offending the conscience of society—then the government has a heavy burden to bear in justifying a distinction on religious lines. As we show above (pp. 13-15), no mere considerations of convenience will suffice.

It may be argued that the necessary element of rationality for the distinction between religious and nonreligious objectors is supplied by the fact that nonreligious objection is too difficult to measure and adjudicate. Congress, the argument runs, must draw the line at a point where clear distinctions are possible. In World War I, as we know, exemption was given only to those conscientious objectors who adhered to a "well-recognized religious sect" (Act of May 18, 1919, ch. 15, Sec. 4, 40 Stat. 78), a relatively easy test to apply. In recent years, the test has been religious belief "in a relation to a Supreme Being."

The argument of convenience, we submit, has been effectively destroyed by this Court's decision in *Seeger* and the subsequent amendment of the statute. In *Seeger*, this Court accepted rather vague formulations of "religious" belief on the part of three registrants as falling within the statutory standard of conscientious objection warranting exemption.⁸ Yet, the beliefs expressed by Sisson are so similar that it would take the most convincing case to show that a distinction between the two was not so arbitrary as to be

8. We see no reason to believe that the amendment of the statute subsequent to *Seeger* affects this aspect of the decision.

constitutionally impermissible. More important, the result of *Seeger* is that a person may now claim exemption because of religious conscientious objection on grounds no more clearly measurable than those of Sisson or any other non-religious, ethical objector. Thus, the argument based on convenience no longer applies.

In short, it has not been shown that the goal of maintaining national defense by conscripting an army cannot be achieved by means which do not impose a burden on nonreligious conscientious objectors. Great Britain, as we have seen, has found it possible to operate without distinguishing between religious and nonreligious objectors. And in this country there has been, so far as we know, no significant increase in applications for exemption following this Court's liberal application of Section 6(j) in *Seeger*. There is no reason to believe that the result would be different if Sisson is upheld in his contentions.

D. The Involvement of Draft Boards in Theological Determinations

The distinction between religious and non-religious objection creates another constitutional difficulty. Administration of the distinction imposes on draft boards and the reviewing courts the duty of making theological determinations. They must determine whether an applicant's formulation of the basis for his objection is religious or not.

This is no easy task. This Court itself has had difficulty with such theological questions. Cf. *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1

(1890); *United States v. Ballard*, 322 U. S. 78 (1944). A strong constitutional policy against involvement of civil agencies in the area of theology has been reflected repeatedly in decisions of this Court. *Watson v. Jones*, 80 U. S. 679 (1871); *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190 (1960); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969). As this Court said in *United States v. Ballard*, *supra*, 322 U. S. at 87: "When the triers of fact undertake that task [determination of truth or falsity of religious belief], they enter a forbidden domain."

A question may be raised as to whether a draft board or the reviewing court is to make the determination as to the religious character of the applicant's objection on the basis of its own standards or those of the applicant. In the *Seeger* case, this Court, interpreting an earlier version of Section 6(j), said (380 U. S. at 165-166):

* * * the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. * * *

After describing this test as essentially objective, this Court said (at 184-185):

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. * * * The validity of what

he believes cannot be questioned. * * * Their task [that of the boards and courts] is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

It may be questioned whether, despite this language, the draft board must confine itself to whether the registrant regards his conscientious objection as "religious." Must it not, having heard the registrant's statement of his views, decide whether, in its own view, that statement embodies a "religious" belief? In any case, the boards and the courts are inevitably involved in the kind of theological determination which the cases cited above regard as unconstitutional.

POINT TWO

Limiting exemption from military service on the basis of conscientious objection to those whose objection is to all wars constitutes preferential treatment of adherents of some religious or ethical systems over others in violation of the No-Establishment Clause of the First Amendment.

A. Equality Among Sects

We have cited above the cases which, we believe, establish that government may not base statutory distinctions on whether a person acts out of religious rather than nonreligious, ethical motives. It is at least equally clear that government may not discriminate among religions. As this Court said in *School District of Abington Township, Pa. v. Schempp*, *supra*, 374 U. S. at 214:

Almost a hundred years ago in *Minor v. Board of Education of Cincinnati*, Judge Alphonso Taft, father

of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of "absolute equality before the law, of all religious opinions and sects * * *."

In the *Seeger* case, the Court of Appeals for the Second Circuit rested its decision in favor of Seeger expressly on the ground that Section 6(j), as it then stood, unconstitutionally discriminated against those religions that did not include a belief in a Supreme Being; it held that, under this Court's decision in *Torcaso v. Maryland, supra*, "Government could not * * * place the power and authority of the state 'on the side of one particular sect of believers.'" *United States v. Seeger*, 326 F. 2d 846, 853 (2d Cir. 1964). Although this Court affirmed that decision on statutory rather than constitutional grounds, nothing in its opinion undermines the validity of the Court of Appeals' conclusion on this point.

Applicable here also are the cases cited above (pp. 13-15) which establish that legislation limiting First Amendment rights is subject to a rigorous test. The distinction made in Section 6(j) between those religions that object to all wars and those that object only to some wars can be upheld only on the basis of a "compelling governmental interest." *Shapiro v. Thompson, supra*, 383 U. S. at 634.

The statutory limitation of the exemption to those who object to "war in any form" has already been cast in doubt. In *Sicurella v. United States*, 348 U. S. 385 (1955), a member of the Jehovah's Witnesses was denied classification as a conscientious objector on the recommendation of

the Department of Justice which found (as quoted in this Court's decision, 348 U. S. at 388) :

While the registrant may be sincere in the beliefs he has expressed, he has, however, failed to establish that he is opposed to war in any form. As indicated by the statements on his SSS Form No. 150, registrant will fight under some circumstances, namely in defense of his fellow brethren.

This Court, however, upheld the registrant's claim to exemption, saying (348 U. S. at 390-391) :

Granting that these articles picture Jehovah's Witnesses as anti-pacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. (Emphasis in original.) As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future.

We submit that, by resting this decision on statutory grounds, the Court raised constitutional questions of a substantial nature. In effect, it required draft boards and reviewing courts to base their determinations on the content of the religious views of the registrant. This, indeed, is a fundamental defect of Section 6(j). That defect, as we have argued in Point One, invalidates the distinction between religious and nonreligious objection, which requires government officials to determine whether a set of prin-

ciples is based on "religious" training and belief. But it also invalidates the distinction between objection to all war and more limited objection, which requires government officials to analyze the nature of the registrant's ethical system. In both cases, the government becomes involved in "controversies over religious doctrine." *Presbyterian Church, etc. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra*, 393 U. S. at 449, and cases cited *supra*, pp. 20-21.

The burden of our position here is that Section 6(j) enacts an impermissible discrimination among religious sects. We do not contend (and we do not understand appellee as contending) that anyone has a constitutional right to exemption from military service because of conscientious objection. We contend only that Congress has drawn an improper distinction as to who may be exempted.

The Government misses this distinction when it argues that, if appellee is upheld, a person who objects to a particular war will be permitted to refuse to pay taxes for its support (Brief, pp. 44-5). The analogy is false because the law does not now waive taxes for conscientious objectors to all wars. It does, however, grant military exemption to such objectors and the issue is whether it may constitutionally limit the exemption in that fashion.

The analogy between objection to military service and objection to the payment of war taxes was made years ago by Justice Cardozo in a concurring opinion in *Hamilton v. Regents*, 293 U. S. 245, 268 (1934). In that case, however, the issue was not discrimination between different types of

objection but whether students could constitutionally be denied access to a state university because they refused to take military training. In that case, therefore, it could be argued that recognition of a constitutional right to enjoy state benefits free of a requirement of military service would necessarily establish a right to enjoy all state benefits without paying taxes.

We do not believe that that conclusion necessarily follows. There is a vast difference between requiring a man to bear arms and perhaps to kill in violation of his conscience and requiring him to pay taxes for what he regards as wrongful or immoral purposes. In any case, however, Justice Cardozo's argument does not apply in this case, where the issue is not constitutional right but the constitutional validity of statutory classification.

This same distinction also answers the Government's suggestion that this case involves a political question which the courts cannot decide—whether it is necessary to the national security to include conscientious objectors in the armed forces during this particular war (Brief, pp. 40-42). This case can and, we believe, should be decided on the basis of whether the distinction drawn in the statute as to who is and who is not exempt from military service is constitutionally sound. That is not a political question on which courts cannot act.

B. The Ethical Nature of Selective Objection

The Government argues that selective conscientious objection "necessarily involves a political judgment," a judgment not involved in general conscientious objection,

and that this creates a "qualitative difference" which Congress could embody in the statute (Brief, pp. 47-48). But the Government does not deny that this distinction favors those religious groups that counsel nonparticipation in all wars over those whose ethical systems require a judgment between moral and immoral wars. Nor has it attempted to show that there are compelling reasons of state that would justify such discrimination. The Government says at one point that "Appellee's situation—as a non-religious selective objector—is, for understandable reasons, not included in the ambit of conscientious objection given legislative recognition" (Brief, p. 46n). The "understandable reasons" are nowhere set forth.

It may well be true that some ethical systems hold that the political aspects of a war are among the factors to be considered in reaching a judgment as to whether participation is objectionable to the conscience. Thus, Rabbi Irving Greenberg, after reviewing Jewish tradition on participation in war, says:⁹

It is also obvious from this that moral or spiritual judgments on a war cannot be made abstractly. The halachist [student of rabbinic law] must know the political military situation insofar as is possible, and the political judgments involved. For example: is there a direct possibility of physical or spiritual annihilation if I do not fight? Is the enemy system bent on my destruction? From these judgments flow the moral judgment, if any is possible.

But this does not make the ultimate decision against participation any less a matter of religious or ethical con-

9. "Judaism and World Peace: Focus Viet Nam," published by Synagogue Council of America (1966), p. 20.

science, nor does it supply a sufficient justification for a statutory distinction favoring those ethical systems that do not consider political factors over those that do.

We shall not attempt an extensive demonstration that some religious systems do distinguish among wars in deciding whether there is a moral requirement to refrain from participation. In a sense, any such presentation is irrelevant to the issues in this case. Even within the assumption that the statutory exemption is validly limited to religious objectors to all wars, determinations must be made on the basis of the registrant's own religious system, not on whether there is a body of belief officially established by a religious body for all its followers. As this Court said in *Seeger* (380 U. S. at 184), "**** it must be remembered that in resolving these ~~exemption~~ problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways." However, it is useful to show that there are elements in Jewish law which could rationally persuade some Jews to believe that selective resistance to war is a moral imperative.¹⁰

One element in the anti-war tradition was Isaiah's prophecy of universal peace (Isaiah 2:4, Micah 4:3-4; see also Zachariah 4:6; Isaiah 30:15; Hosea 1:7). The *Midrash* says (*Leviticus Rabbah, Tzav, IX, 9*):

10. In the recent decision in *United States v. Bowen*, U.S.D.C., N.D., Cal., Cr. No. 42499, decided December 24, 1969, the District Court found ample evidence that a substantial number of Catholic leaders believe that Catholic tradition requires members of that communion to distinguish between service in "just" and "unjust" wars and that "communicants of other faiths—Protestant and Jewish—have ample doctrine in their religion to support similar religious conscientious objection."

R. Simeon b. Yohai said: Great is peace, since all blessing are comprised therein, as it is written, *The Lord will give strength unto His people; the Lord will bless His people with peace* (Ps. xxix, 11). Hezekiah said two things. Hezekiah said: Great is peace, for in connection with all other precepts it is written, *If thou meet*, etc. (Ex. xxiii, 4), *If thou see* (ib. 5), *If there chance* (Deut. xxii, 6), which implies: if a precept comes to your hand, you are bound to perform it. In this case, however, [it says], *Seek peace, and pursue it* (Ps. xxxiv, 15), [meaning] seek it for thine own place and follow it to another place.

This principle is strengthened by specific teachings and laws (*Sanhedrin*, 74a):

* * * in every other law of the Torah, if a man is commanded "Transgress and suffer not death" he may transgress and not suffer death, excepting murder * * * murder may not be practiced to save one's life. * * * Even as one who came before Raba and said to him, "the Governor of my town has ordered me 'Go, and kill so and so; if not, I will slay thee.'" He answered him, "Let him rather slay you than that you should commit murder; who knows that your blood is redder? Perhaps his blood is redder?"

See also *Pesikta Rabbati*, 21:18; *Mishnah Sanhedrin*, IV, 5.

More specifically, distinctions among wars are a vital part of Jewish law. Rabbi Seymour Siegel tells us:¹¹

The tradition has three categories of war; an obligatory war (*milchemet chova*); an imperative war (*mil-*

11. "Judaism and World Peace," *op. cit. supra*, p. 13.

chemet mitzvah); and a war of choice (milchemet reshut).

In the case of the war of choice, a number of exemptions from military service are recognized.¹² One student of Jewish tradition has concluded that Jewish sources can provide support for every conceivable position from militarism to absolute pacifism.¹³

But what matters is not what authority teaches but what the individual believes. "Judaism considers each individual personally responsible before God for his action."¹⁴ As stated by Rabbi Arthur J. Lelyveld:¹⁵

In the realm of conscience every individual is in the last analysis alone with the Ribono Shel Olam, the source of Ultimate Demand. In Judaism, the nature of that demand is illuminated by the expérience of the group which preserves it and transmits it. Out of our history and our affirmations we have a developed value-stance from which we approach the situations that require decision and from which we test the validity of the ideals that are normative in our tradition.

12. Gendler, Everett E., "War and the Jewish Tradition," in *A Conflict of Loyalties; the Case for the Selective Conscientious Objector*, James Finn, ed. (1968).

13. Cronbach, Abraham, in *46 Yearbook of the Central Conference of American Rabbis*, 198 (1936).

14. Resolution on "Conscientious Objection," adopted by the Commission on Social Justice of the Synagogue Council of America on and referred for approval to the Plenum of the Synagogue Council.

15. "Judaism and World Peace, *op cit. supra*, p. 26.

Conclusion

We submit that the court below was correct in holding that, under the strictures of the First Amendment, the appellee could not be denied exemption from military service granted to others on the ground of conscientious objection, either because his objection was based on nonreligious rather than religious belief or because he did not object to all wars.

Respectfully submitted,

JOSEPH B. ROBISON
15 East 84th Street
New York, New York 10028
Attorney for Amicus Curiae

Of Counsel,

LORRAINE LEVITT
EPHRAIM MARGOLIN

January, 1970